Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

LUCILE C. BARNETT - - - - - *Petitioner*

versus

DEPARTMENT OF VETERAN AFFAIRS - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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November 25, 1998

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1/2 PP

QUESTIONS PRESENTED

1. Whether the decision in time re: reprisal is affected by fact that comments began immediately and escalated over time.

2. Whether departmental procedures were used to discriminate against only female in department.

3. Whether issues of workload and office procedure should be considered in evaluation of discrimination claims where only female in department has higher workload than males in department.

4. Whether the communication of a rule by a male to males but not to the only female employee and then to use that rule against the female employee constitutes unlawful sex discrimination.

PARTIES

The Parties herein:

Lucile Barnett ..... Plaintiff

Department of Veteran Affairs ..... Defendant

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OPINIONS BELOW

The judgment sought to be reviewed is that of the Sixth Circuit Court of Appeals in *Lucile Barnett v. Department of Veterans Affairs*, 1998 (Circuit Court Number 96-6145), entered August 28,1 998. (Appendix *infra* pp. 1a). The decision of the trial court is not officially reported.

JURISDICTION

This is a case arising under Title VII of the Civil Rights Act of the United States, 42 USC 2000(c) *et. seq.*, and the Age Discrimination in Employment Act 29 USC 633a.

The Notice of Appeal was filed August 20, 1996.

The jurisdiction of the Supreme Court to the United States is conferred by Rule 19 of the Supreme Court of the United States and 28 USC §2101.

STATEMENT OF THE CASE

A. Overview

Plaintiff, Lucile Barnett, Ph.D., was reassigned as a counseling psychologist (CP) in the Vocational Rehabilitation and Counseling (VR&C) Division of the United States Department of Veterans Affairs (DVA), under Mr. Leonard Mullins, beginning August 2, 1987. This reassignment followed previous Title VII litigation in which Barnett successfully alleged the DVA wrongfully reduced her rank from GS-12, rating specialist to GS-7 adjudicator.

The work of a counseling psychologist (CP) involved determining educational and vocational services needed for veterans with service connected (SC) disability to obtain suitable employment. Clients entitled to these services were classified as employment handicapped based on qualifying criteria of disability and factual historical date. Additional duties as an acting Vocational Rehabilitation Specialist (VRS) included services and supervision for veterans in training at local facilities.

Under an annual Performance Appraisal Plan (PAP) satisfactory performance permitted no more than 10 procedural, 6 Judgmental, and 3 substantive errors.[1]

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[1] These errors were defined by DVA under the Statistical Quality Review System. (DVA Circular 28-82-2), (Joint Ex. I, Exhibit B to MSPB, pg. 333 and DVA Exhibit to MSPB, Book III, 4d(2))

1. *Substantive Error:* A serious deviation from established guidelines which affects the improper, incorrect or timely denial or granting of a benefit when the correct action would have had the opposite result. The term "benefit" is not restricted to monetary consideration, but also includes any other entitlement right subject to disposition.
2. *Judgmental Deficiency*: An inadequate reasoning process leading to a decision or opinion which may be considered

(Continued next page)

Annual evaluations covered a period from April 1 of a given year to March 31 the following year. Barnett's work was evaluated as satisfactory in March, 1988, 1989 and 1990.

Barnett while in training under Mullins, filed an EEO complaint in 1988 concerning the commentary on her performance appraisal. In April and May of 1990, Barnett filed EEO complaints of disparate treatment and retaliation, and in November 1990 another complaint of retaliation.

Mullins' hostility toward Barnett, present from the beginning, increased in severity after the early 1990 EEO activity with public ridicule and frequent meetings in which Barnett was subjected to his too loud, demeaning, and insulting remarks along with intimidation. Barnett's work was scrutinized to an extent not characteristic of the work of her co-workers.

On March 11, 1991, Mullins gave Barnett a "Warning of Unacceptable Performance — Notice of Opportunity Period" letter. It stated Barnett had committed seven substantive errors during the appraisal year, four more than allowed under the PAP. The letter informed Barnett she would be given an opportunity period of 60 days to improve her performance, and specified Barnett could make no more than one substantive, two judgmental, and four procedural errors during the 60 day period.

(Continued from preceding page)

to be inappropriate based on the facts of record and applicable program guidelines. This definition also applies to deficiencies which are considered to be of greater significance than procedural or mechanical discrepancies.

3. *Procedural Discrepancy:* A deviation from established method or form which does not have actual or potential effect on entitlement rights.

Mullins reviewed 45 cases and alleged Barnett had made eight substantive, 13 judgmental, and 18 procedural errors.[2] Mullins sent Barnett a notice of removal along with an offer to respond to the proposed action. Barnett contested the removal in writing but her removal was approved by Mr. John Hagan, then Director of the Louisville, Kentucky office, based on some of her cases being sent to Central Office and Mullins's recommendation. Mr. Ray Hill, a younger male employee, replaced Barnett.[3]

Barnett continued her EEO activities, filing complaints of retaliation concerning alleged errors in her work in January, March, and July 1991 and in August, 1991 concerning an incorrect SF 50-B Notification of Personnel Action.

Barnett filed a complaint in federal district court on September 18, 1991, alleging the DVA engaged in age and gender based discriminatory employment practices in violation of the ADEA and Title VII of the Civil Rights Act of 1964. Specifically, Barnett contended that the DVA, through its agent Leonard Mullins, had treated her with discriminatory animus and retaliated against her because of her EEO complaint activities.

The district court conducted a bench trial and, in a Memorandum Opinion filed July 22, 1996, concluded Barnett had presented a prima facie case of age and gender discrimination but had failed to demonstrate the DVA acted in a pretextual manner under *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993).

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[2] The Agency later, at the MSPB hearing, indicated the alleged errors should have been reported as eight substantive, six judgmental and four procedural according to DVA's instructions for reporting exceptions to employees work under the SQC system.

[3] The precise age of Ray Hill does not appear in the record. Neither party disputed Barnett's claim that Mr. Hill was "around 40". Barnett was 67 years of age when terminated.

While the court recognized the subjectivity of the counseling process, the court concluded Barnett's discharge was not fabricated nor pretextual, based on "objective" performance criteria.

Barnett was found not to have established a prima facie case of retaliation because of EEO activities, as these EEO activities had no link to her discharge.

Barnett appealed to the Sixth Circuit Court of Appeals which affirmed the district court's findings.

ARGUMENT

A. Basic Statement of the Law

Using the most common test for discrimination, in order to prevail under Title VII, the Plaintiff must first establish a prima facie case of sex discrimination which requires that she prove that: (1) she is a member of a protected class; (2) an adverse employment decision was made against her; (3) she was otherwise qualified for the position from which the adverse decision arose; and (4) a person not of her protected class replaced her. See: *Ensley-Gaines v. Runyon*, 100 F.3d 1120, 1224 (6th Cir. 1996); *Cf. McDonnell Douglass Corp. V. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). Once the prima facie elements have been established, the defendant must produce evidence that a legitimate non-discriminatory reason for its action. *McDonnell Douglas*, 411 U.S. at 802. The burden of persuasion then returns to the plaintiff to demonstrate. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 252-53 (1981); *Goosetree v. Tennessee*, 796 F.2d 854, 861-63 (6th Cir. 1986).

Under the ADEA, a plaintiff must demonstrate evidence of the following to make out a prima facie case of age discrimination: (1) that plaintiff was between 40 and 65 years old; (2) that she was qualified for the particular

position; (3) that she was subjected to adverse employment action; and (4) that she was replaced by a younger individual. See: *Waythal v. Tex-Tenn Corp.*, 112 F.3d 243, 246 (6th Cir. 1997); See Also: *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1390 (6th Cir. 1993). Once a prima facie case has been established, the shifting burden framework of *McDonnell Douglas* as stated above may be applied to cases of age discrimination. See: *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994).

The McDonnell Douglas test is not a rigid test. Each case must be reviewed on its individual merits. See: *Beaven v. Commonwealth of Kentucky,* 783 F2d 672 (6th Cir. 1986); *Laungenson v. Anaconda Company,* 510 F2d 307 (6th Cir. 1975); *Wanger v. Gray Co.*, 872 F2d 142 (6th Cir. 1989); *Blackwell v. Sun Electric Corp.*, 696 F2d 1176 (6th Cir. 1983).

There is no question that a negative job action was taken against Barnett. She was terminated from her job. In fact, the courts below determined that Lucile Barnett had presented a prima facie case of sex and age discrimination.

Statements regarding age, sex, EEO activity etc. such as Mullins, "The old bitch," are probative of discrimination. See: *Asplundh Tree Expert Co.*, 836 F2d 1544 (10 Cir. 1988) and *Metroff v. Xomax Corp.*, 797 F2d 271 (6 Cir. 1986).

An individual may show that he or she is qualified for a job by demonstrating excessive workload, unreasonable demands, unachievable goals. See: *Dale v. Chicago Tribune Co.* , 797 F2d 458 (7Cir. 1986). The 100% review of Barnett's work, and the conditions regarding that review represent such a situation. This is particularly true in

view of the standards set out for the 100% review discussed herein.

In cases such as this case, where the employer has put on proof of what it claims to be a legitimate nondiscriminatory business reason for its conduct, the inquiry shifts from whether the Plaintiff established a prima facie case of unlawful discrimination, to whether she established by a preponderance of evidence that the challenged action was motivated by unlawful discrimination. See: *United States Postal Services Board of Governors v. Aikens,* 460 U.S. 711 (1983).

The action of the employer in the physical intimidation of Barnett, as well as the public ridicule of Barnett by Mullins' telling stories and jokes about her as well as the exclusion of Barnett from meetings and the refusal to make her "acting" VR&C officer eroded her credibility to others in the office. The employer did not sufficiently address these issues, which when compiled with other mistreatment of Barnett created a hostile work environment as described herein. The Court did not properly interpret the *St. Mary's Home Center* (*IBID*) case in relation to these incidents.

Plaintiff met her burden of proving different treatment and discriminatory motive and intent. Further, the court has tended to ignore the fact that pursuant to *St. Mary's Home Center* (*IBID*), the prima facie case of plaintiff may be alone sufficient to establish pretext. In this case, the long standing hostility and animosity of Mullins toward Barnett beginning prior to Barnett being assigned to work for Mullins could have its basis only in Mullins' knowledge of Barnett's EEO activity. Further, this relationship which began with animosity on the part of Mullins, saw Mullins' animosity increase after Barnett filed EEO charges in his department.

With regard to the reprisal complaint of Lucile Barnett, the courts below have ruled that the termination was separated by too much time from Lucile Barnett's assignment to work for Mullins pursuant to a court order in her prior EEO case. The court should, however, consider that the reprisal began even before Barnett entered Mullins' department and evidenced itself by way of Mullins' treatment of Barnett through her tenure in the department. Further, the reprisal toward Barnett escalated when Barnett filed EEO complaints against Mullins. In short, there was never a period of time during which the atmosphere in the department was not hostile to Lucile Barnett.

To establish her claim of reprisal, Barnett must prove by a preponderance of the evidence that: (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of her civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Johnson v. U.S. Dep't of Health and Human Services*, 30 F.3d 45-7 (6th Cir. 1994); *Canitia v. Yellow Freight Systems, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (per curiam). Once the plaintiff establishes a prima facie, the *McDonnell Douglas* standards may be applied. Thus, the defendant must articulate a legitimate nondiscriminatory reason for its adverse employment action. The plaintiff must then show that the alleged nondiscriminatory reason is pretextual.

B. Barnett Entered A Hostile Workplace Which Became Increasingly More Hostile With The Passage Of Time

Prior to Barnett's reassignment to the Vocational Rehabilitation and Counseling (VRC) department, she had filed three non-selection EEO complaints (1984, 1984, 1985) for three vacancies: two for CP and one for vocational re-

habilitation specialist (VRS). Mullins was the selecting official (Ct. Vol. III, page 37, line 19 — page 39, line 6)[4].

When Barnett was reassigned to VR&C in August 1987, she entered a pre-established hostile environment. Mr. Shrader testified Mullins stated, "I wouldn't hire that old bitch on a bet" (Ct. Vol. IV, page 61, line 12-13). Mr. Duncan testified Mullins referred to Barnett As "little old lady" (Joint Ex. I, MSPB, Vol. II, page 513, line 20 – line 6, page 521). Ms. Zachgo, psychology technician, testified Mullins made known to everyone in the department that he disliked Barnett and didn't want her in his section (Zachgo depo., Joint Ex. I, Ex. A to MSPB, #3, page 16, line 23 24; page 28, line 5-6). Mullins laughed and joked about Barnett with the other CPs (IBID, page 1-12, 17-18).

Mullins made public derogatory statements about Barnett during a videotaping of a gift tape for Tim Lombardi. Ms. Zachgo testified there were some remarks with laughing by Mullins and that he "used to make different cracks about her" (IBID, pages 20 and page 30, line -12). Mr. Duncan reported this same instance (Joint Ex. I, MSPB, Vol. II, page 514-515).

Mullins distanced himself from Barnett, interacting infrequently. (Ct. Vol. I, page 33, line 15 — 25). Barnett requested Mr. Hunsinger be replaced as her trainer because he was unstructured. Mullins became her trainer, reviewing her cases, beginning the latter part of February, 1988. Generally, Mullins returned the folders to Barnett with his notes and without discussion (Ct. Vol. I, p. 53). The isolation of Barnett gradually increased over time.

Mullins refused to go to a departmental Christmas party in 1989 because Barnett would be there (Zachgo depot,

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[4] Barnett had been employed as a counseling psychologist in VR&C from 1973 to 1978 under Dr. Tom Youngman with satisfactory performance ratings.

Joint Ex. I, Ex. A to MSPB, #3, page 18, line 16 — page 20).

Ms. Zachgo as psychology technician was in charge of scheduling veterans for counseling. Mullins instructed her certain initial counseling cases were not to be assigned to Barnett (Zachgo depo., Joint Ex.I, Ex. A to MSPB #3 page 27, line 5-19).

The differences herein demonstrate that Barnett was treated differently than were the male CP's and that the business reason provided by the agency was pretext. The animosity toward Barnett began even before she entered the department. The reprisal against her began almost immediately. Further, the agency has not provided a reason for its failure to communicate. The reprisal resulted in a lack of communication of unwritten departmental rules to Barnett. The facts of the prima facie case are coupled with the lack of communication and the continuous hostility of Mullins for Barnett demonstrate discrimination pursuant to *St. Mary's Home Center v. Hicks*, 509 U.S. 502, 1135, Ct. 2742, (1993).

C. Harassment and Retaliation Followed Settlement of the 1988 EEO Complaint And More EEO Activity[5]

Based on counts from records held by DVA on the number of initial counseling appointments for each CP and days spent outside the office, Barnett wrote a memorandum concerning disparate treatment in the assignment of work and duties. With knowledge of this memorandum, Mullins ordered Barnett to his office April 13, 1990 and for

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[5] Between April and December 1990, Barnett filed three complaints of discrimination, harassment and retaliation' (Joint Exhibit I, Combined Cases 90-767 and 90-821 and Case No. 91-319). An additional five complaints were filed after January, 1991, and were combined in Case No. 91-1329 (Appendix to circuit court, page 465-466).

one hour 30 minutes, Mullins vented his anger with insults and humiliation at a volume so loud that Mr. Cartledge, whose office was next to Mullins's, left his office and went to another division (Joint Ex; I, MSPB' Vol. II, page 333-384).

Mullins appeared very angry, flushed face, waving papers around, and using a very loud, demanding voice. He specifically mentioned the EEO complaint of 1988, the memorandum, using after work hours for travel. (Joint Ex. I, Case 90-821, A-4-2, page 3-5; Ct. Vol. I, page 61-64). The fact that Mullins specifically mentioned Barnett's EEO complaint is probative of retaliation.

The harassment, humiliation, and very loud Interactions continued in Mullins' office each time Barnett submitted work which required Mullins' signature. Ms. Cartledge stated he left his office 3.3 times per month to avoid hearing the confrontations. Ms. Heiskell could recall only one instance each of Mullins raising his voice to Messrs Combs and Hunsinger, and those were in the hallway, Barnett was being harassed. (Heiskell depo., Joint Ex. I, Ex. A to MSPB, #5, page 17, line 6 — page 19, line 20).

Ms. Heiskell whose desk was immediately outside Mullins's doorway, testified when Mullins raised his voice to Barnett, that she never heard Barnett scream at Mullins (Heiskell depo, Joint Ex. I, Ex. A to MSPB, #5, page 19, line 7-9, IBID, page 32, line 24 — page 33, line 1). Ms. Heiskell recalled several occasions when Mullins raised his voice to Barnett when he asked her to come to his office (IBID, page 17, line 6 — page 19, line 8).

Ms. Heiskell testified she never saw Barnett arguing with Mullins with a veteran present (IBID, page 35, line 19-21) in contradiction to Mullins's allegation. (Joint Ex. I, Case 90-821, B-4, page 29, line 34 — page 30, line 4).

Mullins was physically abusive of Barnett, at one point jerking a notepad from her hands.

Personnel Officer Schock testified Barnett was afraid of Mullins and that Mullins had stated he took the notepad from her (Joint Ex. I, MSPB, Vol. II, page 432, line 20 — page 433, Ct. Vol. VIII, page 29, line 12 — line 20, page 30). This is contrary to Mullins's testimony (Ct. Vol. VI, page 103, line 5 — line 17, page 105).

The next EEO complaint was filed November 20, 1990 for an October 16 Formal Counseling Letter which concerned Barnett's interaction with a veteran and staff members when travel expenses were denied veterans and the veteran was without funds to return home (Joint Ex. I, Case 91-319). Most of Mullins's fault-finding was shown by the DVA investigation to have no basis in fact (Appendix A to Plaintiff's Post-trial Brief, Contradictions #1, and Ct. Vol. II, page 111, line 10 — page 116, line 12). DVA offered full relief of this complaint.

Another EEO complaint on a November 20, 1990, Review of Congressional Letter concerned a number of alleged errors which were inappropriate (Joint Ex. I, MSPB, Agency Book III, 4 c (4)). The formal complaint was filed January 2, 1991.

Ms. Heiskell, Mullins' confidante, testified Barnett was treated differently (Joint Ex. I, Case 91-1329, B-14, page 3; Heiskell depo, Ex. A to MSPB, #5, page 4). Mullins treatment of Barnett was said to be "stiff and formal" (IBID. page 56, line 7-9). "Barnett was treated more formally and less friendly; the others were more like buddies and pals." (IBID. page 36, lines 4-6).

Mullins testified it was after Barnett filed her first EEO complaint that he determined the relationship between him and Barnett was not good (Joint Ex. I, MSPB, Vol. I, page 165, line 5-9). In the same testimony, Mullins testified that he had a "healthy relationship" with Barnett at that time. (IBID. page 25, line 13-16). The fact that

Mullins related this to an EEO complaint is probative of retaliation.

Mullins denigrated Barnett's interactions with staff members, saying she had problems getting along and was rude (Ct. Vol. VI, page 82, line 12-13, Joint Ex. I, Case 90-821, B-4, page 2, line 33, page 3, line 17; IBID. page 16, line 17-34). Barnett's co-workers described her relationship with them as "... cordial ... professional, ... friendly ... no difficulty working with Barnett" (Joint Exhibit I, MSPB, Vol. II: Combs, page 349-355; Cartledge, page 376; Wilkerson, page 411; MSPB, Vol. I, Hill, page 208-209, 218; IBID, Case No. 91-319: Hunsinger, B-11, page 5, Ans. 29; Combs, B-7, page 7, Ans. 29; Case No. 91-1329, Heiskell, B-14, page 3, 4th ques/ans; Case No. 90-821, Cartledge, B-6, page 1, ques/ans. 6).

Mullins claimed veterans had complained about Barnett. Mullins testified to only one complaint from one unknown veteran. (Joint Ex. I, MSPB, Vol. I, page 156, line 20 — page 157, line 19).

Ms. Zachgo had no valid complaints from veterans about Barnett (Zachgo depo., Joint Ex. I, Ex. A to MSPB, page 25, line 17 — page 26, line 6). Ms. Heiskell reported one veteran complained and then conceded Barnett could have been just doing her job (IBID. Heiskell depo., page 78, line 14 — page 79, line 18).

While the hostility and reprisal began almost immediately, the hostility increased after Barnett filed these EEO complaints. The notice of proposed termination and the removal were sufficiently close in time to be reprisal for these EEO complaints. See: *Johnson v. U.S. Dept. Of Health & Human Services*, 30 F.3d 45-7 (6th Cir., 1994).

D. Other Differences In Treatment Demonstrating Discrimination

Seriously Disabled Veterans: In October 1990, veterans with 50 percent or more disability had preference in

scheduling (Heiskell depo., Joint Ex. I, Ex. A to MSPB, #5, page 5, line 23 — page 6, line 7). The probability of Barnett being assigned seriously disabled veterans was greater than for others because she spent more days in the office.

Co-Workers are an Important Resource: Regulations encourage the discussion of cases with co-workers. Male CPs discussed cases with each other frequently (Joint Ex. I, Ex. A to MSPB, Zachgo depo., page 24, line 15 — page 25, line 12; Page 30, line 22 page 32, line 7; Heiskell depo., page 53, line 6-14). Mullins criticized Barnett, alleging she was not making independent decisions (Joint Ex. I, Case 89~437, B-6, page 6, last part ques/ans. 2; Case 90-821, B-4, page 3, line 5-17; page 42, line 1-16). His allegation was contradicted by testimony from Dr. Combs. (IBID. B-8, page 2, Ans. 7), and Mr. Hunsinger. (IBID. Case 91-1329, B-7, page 2, Ques/Ans. 3 & 4) and by Mullins's own testimony. (IBID, Case 91-1329, page 3, last 8 line of last Ques/Ans).

Advisory Opinions: Male CPs obtained advisory opinions direct from contact with Central Office (Joint Ex. I, MSPB, Vol. II, page 338, line 20 — page 339, line 2; IBID, Case 91-1329, B-6, page 2, first ques/ans). Barnett was denied this privilege.

Interoffice Communication: Barnett was isolated from others by Mullins's criticisms and his increasing abuse. Ms. Heiskell testified information in the office was not communicated formally. Information was passed on informally and because Barnett was not one of the guys, much information needed to perform the work was denied to Barnett (Joint Ex. I, Case 91-1329, B-14, page 3-4).

Acting VR&C Officer: All CPs except Barnett were assigned on a rotating basis to the job of acting VR&C officer. Mr. Hunsinger shared this assignment until 1990 (IBID. page 29, line 10-20; page 10, line 10 — page 11, line 12; IBID, MSPB, Vol. II, page 399, line 5-20).

Ms. Zachgo testified Mullins said he would never make Barnett acting VR&C officer unless the front office demanded she had to be included (IBID, page 22, line 5-13).

E. There Was Confusion, Contradiction, and Discrimination in Applying Performance Standards.

Quality Review System (QRS) and Statistical Quality Control (SQC) and the Performance Appraisal Plan (PAP): The QRS method of evaluating CP and VRS work had been used from the end of 1988. Agency witness, Dr. Lawson, testified this method was intended to be more positive in evaluating work, eliminating some of the negativism of the SQC system which concentrated on errors (Joint Ex. I, MSPB, Vol. I, page 267, line 1-25).

Mullins testified his Central Office training was that findings from QRS should not be applied to determine performance (IBID., Vol. I, page 44, line 3 page 45, line 3). Further, QRS measures the overall quality of services being provided by the division, and the completed QRS sheets are not used in any way, shape or form to determine performance (IBID, Vol. I, page 105, line 20 — page 106, line 3).

Mullins was required to review six cases per case manager per quarter under the QRS system and those cases were to be selected randomly (IBID, page 41, line 15-17). This aspect of reviewing work was uniform as was the annual error limitation under the PAP.

The PAP provides for the identification of errors under "measurement indicators. These include files referred to the reviewing officer through congressional inquiries, re-evaluations, or any case requiring the VR&C officer's signature, such as, out-of-state training, use of high tuition cost schools, tutoring contracts, granting additional entitlement, etc.

The number of cases reviewed for each case manager under measurement indicators was not uniform. Mullins

testified he had no idea how many cases he reviewed for each CP under measurement indicators (Ct. Vol. VII, page 23, line 10 — page 24, line 10; Joint Ex. I, MSPB, Vol. I, page 107, line 12 — page 108, line 17). Both Messrs. Combs and Hunsinger testified QRS cases were the only cases reviewed by Mullins (Joint Ex. I, Case 90-821, B-8, page 2, Ques/Ans. 10-12; Case No. 91-319, B-11, page 3, Ques/Ans. 14).

Both Combs and Hunsinger stated that Barnett was scheduled to see more veterans than they (Joint Ex. I, Case 90-821, B-8, page 8, Ques/Ans. 9 and IBID, B-7, page 2, Ques/Ans. 9 — 10). In 1990, Barnett had 48 more initial counseling clients reporting than Dr. Combs and 63 more than Mr. Hunsinger (Plaintiff's Ct., Ex. F(Rev.) page 29).

Barnett had half as many trainees for her VRS assignment as Mr. Cartledge who was 75 percent VRS and 2-1/2 times as many trainees as Mr. Hunsinger (IBID, page 26). Trainees at the community college to which Barnett was assigned required more tutorial assistance and curriculum guidance than trade schools or four-year colleges. Dr. Combs testified he discussed cases with Mullins which required his approval (Joint Ex. I, MSPB, Vol. II, page 332, line 3-21). Both Messrs. Cartledge and Hunsinger discussed cases with Mullins (IBID, page 382, line 12 — page 383, line 1; Case 91-319, B-11, page 3, Ques/Ans. 13 and page 3-4, Ques/Ans. 19). This type of relationship with Mullins did not exist for Barnett.

The unreasonable demands and expectations herein create an inference of discrimination. Further, the use of unreasonable expectations during the warning period create a circumstance of impossibility of performance. Such actions on the part of the agency are evidence of discrimination. See: *Dale v. Chicago Tribune Company, supra.*

Eligibility Determinations: Mullins testified if the CP changed their eligibility decision to agree with his de-

termination, no error would be counted against them on performance standards (Ct. Vol. VI, page 158, line 9-18; Joint Ex. I, MSPB, Vol. I, page 38, line 5-19; IBID, Case No. 91-1329, B-14, page 5, last Ans, line 13-19). Mullins stated this policy was discussed with each CP when they came to the division (Ct. Vol. VI, page 160, line 8-18 and page 160, line 22 — page 161, line 1) and in staff meetings (Joint Ex. I, MSPB, Vol. I, page 97, line 19 page 98, line 7). (Mullins admitted staff meetings were not held (Ct. Vol. VI, page 89, line 17-18)).

Mullins testified he disagreed with CPs on eligibility determinations "... many times over ..." (Joint Ex. I, MSPB, Vol. I, page 39, line 9-24); if CPs did not know of this policy, none would have met their performance standards and alleged Barnett would not have met her PAP the first three years (Ct. Vol. VI, page 160, line 11-13).

Barnett first heard of this policy after she was terminated (Ct. Vol. I, page 149-150). Her first performance appraisal (1988) was satisfactory; she was training under Mullins and errors in his review of her work did not apply under the PAP (Joint Ex. I, Case 89-437, page 2, 1st Ans). Mullins testified after the first year, if Barnett had an error he would apply the performance standards and count that error at the end of the year (Ct. Vol. IV, page 133, line 10-19).

The failure of the agency to provide Barnett with this information critical to the performance of her job while males were provided the information, plus the failure to apply the rule to Barnett when it was applied to males, demonstrates discrimination. See: *Johnson v. Lehman*, 679 F.2d 918 (1982).

The Unsatisfactory Performance (April 1, 1990 to March 10, 1991): Immediately following Barnett's complaints of disparate treatment and retaliation, Barnett's work was subjected to a critical scrutiny not applied to others.

As late as August 28, 1990, Mullins stated Barnett had six cases (per quarter) reviewed by him, the same as other CPs, but that Barnett was the only one who submitted cases for his review (Joint Ex. I, Case 9O-821, B-4, p. 21, ans. 45). All three male CPs testified they discussed cases with Mullins (Joint Ex. I, MSPB, Vol. II, pg. 281, line 12-l4; IBID, pg. 332, line 1-25; IBID. pg. 396, line 24 — 397, line 2).[6]

Mullins testified he had no idea how many cases he reviewed for each CP (Ct. Vol. VI, page 23-24; Joint Ex. I, MSPB, page 107-108). Both Combs and Hunsinger testified only six randomly selected cases per quarter under QRS were reviewed for their annual performance (Joint Ex. I, Case 90-821, B-8, pg. 2, line 28-41; IBID, Case 91-319, B-11, pg. 3, Ques/Ans. 14).

Barnett submitted cases to Mullins requiring his signature without pre-discussion. Dr. Combs testified he discussed cases requiring Mullins's signature with him, assuring acceptance. (Joint Ex. I, MSPB, Vol. II, pg. 332, line 7-21).

F. The Opportunity Period Did Not Provide an Objective Measure of Plaintiff's Performance

Opportunity Period: The warning notice of unacceptable performance on March 11, 1991, gave Barnett 60 days in which to improve her performance.[7]

Incorrect Error Count: The alleged 29 errors cited for this period in the removal letter is in error as is the citing of 18 of the 45 cases reviewed. Mullins admitted

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[6] The "discussions" between Barnett and Mullins consisted of his reading his notes on his review of her cases to her, interspersed with hostility, belittlement and his raised voice.

[7] It is logical to conclude the 60 days granted to improve performance would not include cases on which work had been performed before the beginning date of the 60-day period.

that Barnett only committed four procedural, six judgmental, and eight substantive errors when DVA made this correction for the MSPB hearing.[8] Central Office instructions under the SQC system indicated only the most serious error in a given case should be noted for exception.[9]

The alleged substantive error on Hutchinson was on VRS work completed March 5, 1990, which was during the 1989-1990 annual review period for which Barnett had received a fully satisfactory performance appraisal (Joint Ex. I, Ex. E to MSPB, pg. 324-325). An alleged substantive error on Malinski and procedural error on Daniels was for CP work completed in December and October, 1990, predating the opportunity period beginning March 11, 1991. (IBID., pg. 136-139; pg. 158-158a) The number of cases for the opportunity period on which Mullins alleged error should have been 15.

Statistically Invalid Performance Standards: Mullins established performance standards for the opportunity period as not more than one substantive, two Judgmental, and four procedural errors. Based on the number of cases reviewed, these permitted error rates of 2, 4, and 9 percents respectively compared with annual PAP error rates set by Central Office of 12.5, 25, and 41.67 percents.

Central Office standards were based on a review of a sample of cases. The assumption underlying sampling is that the sample is representative of the whole. As the size of the sample increases, the number of errors would be expected to increase but the percent in error would remain the same. Percent in error is the only statistically logical

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[8] Joint Exhibit I, DVA Prehearing Submission to MSPB, page 5, line 1-5. Neither court has recognized the incorrect reporting of alleged error count on which Barnett was terminated.

[9] Joint Ex. I, Ex. B to MSPB, M28-3, App. A-1, pg. 314 and Brief of Appellant to Sixth Circuit Court of Appeals, page 33.

method of comparing annual performance standards (based on an annual sample of 24 cases for Combs and Hunsinger) with the opportunity standards (based on a review of every case, a total of 45 cases (Ct. Vol. V, pg. 51, line 3-8)).

Performance standards for the opportunity period total review which would be statistically valid and comparable to those established for annual performance standards based in sampling would be:

	Annual Performance Standards			Opportunity Period	
Error type	Number	Percent	Control Limits[10]	Number	Percent
Substantive	3	12.5	14.45	6	13.33
Judgmental	6	25.0	21.04	9	20.0
Procedural	10	41.67	30.12	13	28.88

Counting only the most serious errors, Barnett met valid performance standards for alleged judgmental and procedural errors. Eliminating the two substantive errors alleged on cases dated outside the opportunity period (Hutchinson and Malinski), along with Central Office directives and DVA's correction previously cited, Barnett made an alleged six substantive, six judgmental, and four procedural errors.

Six substantive errors would fall below the control limits for acceptable annual performance, exceeding the actual percent in error by eight-tenths of one percent. Six judgmental and four procedural errors would fall below the annual actual percent in error as well as the annual control limits.

Pattern and Practice of Alleging Errors: As Barnett's EEO activity increased in April 1990, Mr. Mullins's hostility, harassment, and intimidation increased along with scrutiny of her work and the allegation of er-

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[10] Upper Control Limits are from M20-2, Ch. 5, SQC Chart for Percent in Error, Appendix E (Plaintiff's Ct., Exhibit F (Rev.), page 247, 251, 253).

rors. This behavior by Mullins echoed his treatment of Eric Shrader after he filed an EEO complaint (Ct. Vol. IV, page 52-54; pg. 56, line 15-20). Before his March 1985 annual performance evaluation was due, Mr. Shrader successfully prevailed in competitive federal employment at another agency and left DVA (IBID, page 57, line 5-10). The failure of the agency to follow its rules in these circumstances provides evidence of discrimination. See: *Johnson v. Lehman, IBID.* Further, the creation of impossible criteria creates an inference of discrimination. See: *Dale v. Chicago Tribune Company, IBID.*

G. Central Office Reviews and Termination

Consensus by Central Office: Both Drs. Carson and Lawson testified they had no knowledge of any instance in which Central Office found any CP's decision to be correct. (Defendant's Ex. 57, page 104-108, line 17; Joint Ex. I, MSPB, Vol. I, page 260, line 1-14).

Mullins submitted incomplete case files for review: Dr. Carson testified Central Office receives the actual case file (Defendant's Ex. 57, page 110, line 5-7) containing all the information available, including"any memos that were written at the local office" (IBID, page 15, line 15 — page 16, line 22). (IBID, page 25, line 16-23; page 60, line 10, page 61, line 24; page 65, line 21-22; page 74, line 2-3; and page 84, line 11-13).

Dr. Lawson testified his determinations were made from duplicate copies of the case materials available to Dr. Carson in her decision-making at Central Office in 1990-91. Although Barnett had submitted a letter of explanation in all cases, there was a letter by Barnett in only one of the case files reviewed (Joint Ex. I, MSPB, Vol. I, page 244, line 16-25).

An exchange of memos on Griffin was not in either the evidence file provided Barnett or in materials DVA sub-

mitted to MSPB (Joint Ex. I, Exhibit E to MSPB, page 99-102; IBID. DVA submission to MSPB, Book III, 4 f (7)).

The manipulation of data creates an inference of discrimination.

Termination as Discipline: Termination of Barnett was approved by John W. Hagan, Jr., then Director of the Regional Office, Louisville, Kentucky. He testified Barnett was terminated because four of the cases were sent to Central Office and the termination was in agreement with her supervisor's (Mullins) recommendation (Joint Ex. I, MSPB, Vol. I, page 280, line 14 — page 281, line 8; IBID, page 285, line 15 — page 286, line 17). Mr. Hagan stated Barnett refused to change her opinion and at that point the issue could be resolved only in Washington, that if she had agreed the errors were there and corrected them, there wouldn't have been an issue and she wouldn't have been terminated (IBID, page 286, line 5-17).

Defense witnesses, Dr. Lawson and Ms. Carson denied Central Office review of cases had anything to do with performance appraisals or disciplining employees (IBID, page 259, line 4 and line 22-24; Defendant's Ex. 57, page 110, line 16 — page 111, line 10; page 150, line 9-17).

H. Subjectivity and the Manipulation of Facts and Regulations

Applications of Subjectivity — A few Examples: The Garnett case was referred to Central Office because Barnett denied Chapter 31 benefits, holding that to assume the veteran's loss of teeth 15 years later was due to his SC fractured jaw would be to establish a causal connection between fractured jaw and loss of teeth, a connection which falls within the jurisdiction of the rating board in the Adjudication Department (Ct. Vol. I, page 106, line 10 — page 108; Joint Ex. I, Ex. D. to MSPB, page 136).

For the Neal case, Barnett found the veteran did not have an employment handicap, having overcome the effects of his SC 20% disability by education (at the masters degree level) and experience. (Joint Ex. I, Ex. B to MSPB, page 208 and M28-1, Part II, para. 1.03 f Step 3 (l)(a) 2 (IBID, page 102).

Ms. Carson believed more information should have been obtained about the viability of a real estate salesman, the ownership of a beauty supply business, and the circumstances of the veteran's employment as Director of Human Resources (Carson depo., Defendant's Ex. 57, page 24, line 2-6, page 116, line 14-19). Despite Carson's criticism of inadequate information, she made a determination the veteran had been denied Chapter 31 benefits.

Veteran Neal was said to be seeking training in the area of computer skills per Carson (IBID, page 141, line 4-7). This was incorrect (Joint Ex. I, Ex. E to MSPB, page 73-77). Mullins testified Neal had no other interests other than working in hospital administration and that the veteran paid his own expenses for his degrees (Ct. Vol. VI, page 4, line 24 — page 5, line 12 and page 6, line 17-25). These were incorrect statements. (Joint Ex. I, Exhibit E to MSPB, page 78-79 and page 89).

Veteran Shook's case was sent to Central Office without the knowledge of, or consultation with, Barnett in violation of M28-1, Part I, para. 3.05 b(2) and para. 3.06 b (Joint Ex. I, Ex. B to MSPB, page 49-50).

The Griffin file was sent to Central Office although the decision on eligibility determination was correct (Joint Ex. I, Ex. E to MSPB, page 105, Part I). The Huntley file was not sent to Central Office as the eligibility determination was correct (Joint Ex. I, Case 91-1329, B-6, page 4, long ans.). Dr. Combs testified he placed the veteran in training and did not change the eligibility determination (Joint Ex. I, MSPB, Vol. II, page 336, line 13 — page 337, line 3).

Defense witness, Carson, stated the denial of additional training on Griffin was a clear and unmistakable error (Defendant s Ex. 57, page 43, line 14-19). The manual M28-1, Part II, para. 103f (l)(a) 2 provides a decision for employment services can later be changed if additional training is needed (Joint Ex. I, Exhibit B to MSPB, page 103, line 4-7). The written response from Central Office stated " The ... determination that Mr. Griffin needs employment services rather than training is hereby reversed (38 CFR 21.414)" (Joint Ex. I, DVA submission to MSPB, Book III, 4 f (7)).

Veteran Woods was rated 10 percent SC for grand mal epilepsy with no neuropathology found. He had had no seizure since 1978 and took medication for control. He was currently employed at the WG13, Step 5 level, earning $15.96 per hour, and had been an electronics inspector since December 1985 (Joint Ex. I, Ex. E to MSPB, page 310-319).

Barnett found the veteran to have overcome his impairment of employability under M28-1, Part II, Chapter 1, para. 1.03(e) which states if the veteran has overcome the effects of the impairment he does not have an employment handicap (Joint Ex. I, Ex. B to MSPB, page 103). Barnett gave the veteran 60 days to submit evidence his disability interfered with his job performance and advised him if his situation changed, he should re-apply for Chapter 31.

Barnett stated in writing to Mullins that she would have no difficulty changing this entitlement determination to agree with Mullins's determination (Joint Ex. I, DVA submission to MSPB, Book III, 4 f (16), contrary to the unwritten policy, Mullins charged her with substantive and judgmental errors.

The Malinski case came to Mullins's attention because the veteran wrote his Congressman, a regular occurrence

per Mullins's testimony (Ct. Vol. VI, page 22, line 1-3). Barnett admitted in writing the "clear and unmistakable error" (Joint Ex. I, DVA submission to MSPB, Book III, 4f(8), Memoranda April 12 and April 10, 1991). Because Barnett agreed she erred, the case should not have been sent to Central Office for resolution. Barnett should have been given the opportunity to revise her decision before the case was given to another CP.

Both the Woods and Malinski cases are examples of cases which should not have been considered errors according to Mullins's "unwritten, local policy" on eligibility determinations, that when there is disagreement between a CP and himself on an eligibility determination, there is no error charged if the CP changes his/her decision to agree with his. (Barnett was not given the opportunity to change the decisions). Both demonstrate that by Mullins' testimony, he treated Barnett differently than he did the male counseling psychologists who had not filed discrimination complaints.

REASONS FOR GRANTING THE WRIT

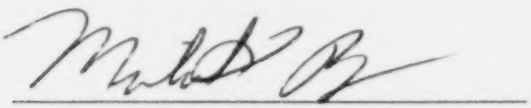
The Writ herein should be granted because the Court of Appeals below has misapplied the case *St. Mary's Home Center* (*IBID*) in that it has misconstrued the burden of proof on plaintiff in a discrimination case. The *St. Mary's Home Center* (*IBID*) did not change the law but, merely clarified the burden of proof. The prima facie case may standing alone or in conjunction with other evidence, create the proof of discrimination in a discrimination case.

Further, in cases of reprisal, where the Trial Court bases its ruling on the nexus in time between the EEO complaint and the job action, it is easy for the Trial Court not to consider the intervening acts of the employer in determining whether a nexus of time exists.

CONCLUSION

The decision of the Trial Court is clearly erroneous. Barnett demonstrated that there was bias and discrimination against her at the time she entered the Department. This fact was clearly demonstrated in the comments to Shrader by Mullins that he wouldn't hire the old bitch on a bet. It was further demonstrated by the statement of Ira Combs that he had negative feelings toward Barnett at the time she entered the department. The difference in treatment of Barnett began almost immediately as was demonstrated when she was refused the opportunity to serve acting VR&C Officer and continued throughout her employment as demonstrated by the testimony at the trial and the administrative hearings, and as demonstrated throughout this brief.

Respectfully submitted,



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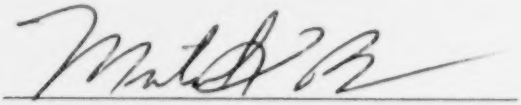
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed this 25 day of November, 1998, to Regina Edwards, Assistant U. S. Attorney, 10th Floor, Bank of Louisville Building, 510 West Broadway, Louisville, Kentucky 40202 and Mr. Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543.



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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1998 FED App. 0266P (6th Cir.)
File Name: 98a0266p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 96-6145

LUCILE BARNETT, - - - - - *Plaintiff-Appellant,*

v.

DEPARTMENT OF VETERANS AFFAIRS - - - - - - *Defendant-Appellee.*

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 91-00621, 92-00671—Charles M. Allen, District Judge.

Argued: July 29, 1997

OPINION—Decided and Filed August 28, 1998

Before: JONES, NELSON, and RYAN, Circuit Judges.

COUNSEL

ARGUED: Michael L. Boylan, Louisville, Kentucky, for Appellant. Richard A. Dennis, OFFICE OF THE U.S. ATTORNEY, Louisville, Kentucky, for Appellee. ON BRIEF: Michael L. Boylan, Louisville, Kentucky, for Appellant. Regina S. Edwards, Terry M. Cushing, OFFICE OF THE U.S. ATTORNEY, Louisville, Kentucky, for Appellee.

OPINION

NATHANIEL R. JONES, Circuit Judge. Plaintiff Lucile Barnett appeals the denial of her gender and age discrimination claims under Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, following a bench trial below. Barnett claims that her supervisor intentionally discriminated against her and forced her removal from the Vocational Rehabilitation and Counseling section of the Department of Veterans Affairs (DVA). Having considered the record developed below, we find that the district court did not clearly err in its findings and therefore affirm.

I.

Plaintiff Lucile Barnett worked as a counseling psychologist in the United States Department of Veteran Affairs (DVA) for four years, beginning on August 8, 1987. Her employment followed a previous Title VII action in which Barnett successfully alleged that the DVA wrongfully reduced her rank from GS-12 to GS-7.[1] As a counseling psychologist, Barnett's duties required her to use her professional assessments of her veteran clients to provide them with "services and assistance" to achieve their employment goals. If her professional assessment permitted, Barnett classified some of her clients as "seriously disabled" or "employment handicapped" in which case such persons were entitled to certain benefits.

Barnett, along with other staff counseling psychologists, was evaluated annually under a Performance Appraisal Plan (PAP). Each year, her superiors would assess her performance as "Outstanding," "Excellent," "Fully Successful," or "Unsuccessful." At the beginning of the evaluation year, the VA staff provided each counseling psychologist

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[1]The prior Title VII litigation resulted in Barnett's placement as a counseling psychologist in the DVA.

with a specific numeric minimal level of performance. All indications are that the minimum performance levels were uniform. In 1991, the year at issue, Barnett received her PAP and was required to make no more than 10 procedural, 6 judgmental, or 3 substantive errors[2] Towards the end of the performance appraisal year, a staff supervisor would review each counseling psychologist's record to determine whether the requisite minimum had been attained.

Prior to 1991, Barnett had received satisfactory marks as a result of her performance. However, in March, 1991, near the end of the appraisal year, Leonard Mullins, Barnett's supervisor, sent her a warning letter marked "Warning of

Unacceptable Performance — Notice of Opportunity Period." The letter stated that Barnett had committed seven substantive errors in the performance appraisal year, four more than allowed under the PAP. Mullins further informed

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[2]According to the DVA, these errors had very definite meanings, which were defined in Department of Veterans Benefits Circular 28-82-1 as follows:

1. *Substantive Error:* A serious deviation from established guidelines which affects the improper, incorrect or timely denial or granting of a benefit when the correct action would have had the opposite result. The term "benefit" is not restricted to monetary consideration, but also includes any other entitlement right subject to disposition.
2. *Judgmental Deficiency:* An inadequate reasoning process leading to a decision or opinion which may be considered to he inappropriate based on the facts of record and applicable program guidelines. This definition also applies to deficiencies which are considered to be of greater significance than procedural or mechanical discrepancies.
3. *Procedural Discrepancy:* A deviation from established method or form which does not have actual or potential effect on entitlement rights.

Barnett that she would be given an opportunity period of 60 days to improve her performance. The letter specified that Barnett could make no more than one substantive, two judgmental or four procedural errors during the 60 day period.

It is clear from the record that Mullins and Barnett had a stormy relationship. The district court found that Mullins grabbed a pencil from Barnett in the course of a discussion, which she viewed as an act of physical intimidation. There was also uncorroborated testimony from another counseling psychologist, Catherine Marie Zachgo, that Mullins disliked Barnett and joked about her performance to other counseling psychologists.

After the opportunity period passed, Mullins reviewed Barnett's cases and found eight substantive errors, thirteen judgmental errors and eighteen procedural errors. Mullins subsequently sent Barnett a notice of removal along with an offer to respond to the proposed action. Although Barnett contested the removal notice both orally and in writing, the Central Office of the DVA approved the decision. Ray Hill, a younger male employee, replaced Barnett.[3]

Subsequently, Barnett filed a complaint in federal district court on September 18, 1991, alleging that the DVA engaged in age- and gender-based discriminatory employment practices in violation of the ADEA and Title VII of the Civil Rights Act of 1964. Specifically, Barnett contended that the DVA, through its agent Leonard Mullins, had treated her in a discriminatory fashion and retaliated against her as a result of her 1991 EBO complaint. The district court conducted a bench trial and, in a Memorandum Opinion filed on July 22, 1996, concluded that Barnett had presented a prima facie case of age and gender discrimination but had failed to demonstrate that the DVA

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[3]The precise age of Ray Hill does not appear in the record; however, Barnett claimed in her testimony that Hill was "around 40" and neither party has disputed that point.

acted in a pretextual manner under St. *Mary's Honor Center* v. *Hicks, 509* U.S. 502 (1993). Having heard all of the evidence presented at trial, the district court made the following observation:

> While the Court realizes that the opinions of counseling psychologists may often be matters for reasonable disagreement as between them and their superiors, and it also realizes that in some cases the opinions called for on the part of a counseling psychologist are in fact somewhat subjective, it still remains the case that the reasons for Dr. Barnett's discharge were not fabricated nor pretextual; therefore she is not entitled to recover either under the trilogy of cases decided prior to *Hicks* or under *Hicks* itself J.A. at 281 (Memorandum Opinion) (parenthetical omitted).

Regarding Barnett's retaliation claim, the district court examined the claims in light of this court's decision in *Cooper* v. *City of North Olmstead,* 795 F.2d 1265 (6th Cir. 1986), to find that Barnett had not established a prima facie case of retaliation because her previous EEO activities had no link to her discharge based on the objective performance criteria.

Barnett then filed this timely appeal.

II.

We review the district court finding that Barnett failed to establish pretext for clear error. *See Kline* v. *Tennessee Valley Authority,* 128 F.3d 337, 341 (6th Cir. 1997) ("A determination of pretext is an intermediate factual step in the determination of the ultimate factual finding of intentional discrimination or the lack thereof. It is a finding of fact subject to the clearly erroneous standard of review.").

In order to prevail under Title VII, Barnett must first establish a prima facie case of gender discrimination, which requires that she prove that: (1) she is a member of a protected class; (2) an adverse employment decision was made against her; (3) she was otherwise qualified for the position from which the adverse decision arose; and (4) a person not of her protected class replaced her. *See Ensley*

Gaines v. *Runyon*, 100 F.3d 1120, 1224 (6th Cir. 1996); *Cf McDonnell Douglass Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs* v. *Burdine*, *450* U.S. 248, 253 n.6 (1981). Once the prima facie elements have been established, the defendant must produce evidence that a legitimate non-discriminatory reason motivated the employment action. *McDonnell Douglas*, 411 U.S. at 802. The burden of persuasion then returns to the plaintiff to demonstrate that the reason proffered by the defendant was pretextual. *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 252-53 (1981); *Goosetree* v. *Tennessee*, 796 F.2d 854, 861-63 (6th Cir. 1986).

Under the ADEA, a plaintiff must proffer evidence of the following to make out a prima facie case of age discrimination: (1) that plaintiff was between 40 and 65 years old; (2) that she was qualified for the particular position; (3) that she was subjected to adverse employment action; and (4) that she was replaced by a younger individual. *See Woythal* v. *Tex-Tenn Corp.*, 112 F.3d 243, 246 (6th Cir. 1997); *see also O'Conner* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *Barnhart* v. *Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1390 (6th Cir. 1993). Once a prima facie case has been established, this court applies the shifting burden framework of *McDonnell Douglas* to age discrimination cases as well. *See Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994).

The district court properly found that Barnett had established a prima facie case of age and gender discrimination. Barnett was 51 years old when she was discharged from her employment, and she was replaced by a substantially younger male, Ray Hill. The parties do not dispute this finding on appeal. As justification for its decision, the DVA proffered evidence at trial that Barnett simply failed to perform according to the PAP, which resulted in her warning notice and eventual removal.

Under both theories of discriminatory treatment, the district court found that Barnett had failed to demonstrate

that the reasons for her termination as provided by the employer were pretextual under *St. Mary's Honor Center* v. *Hicks,* 509 U.S. 502 (1993). Under *Hicks,* a plaintiff seeking recovery under Title VII and the ADEA bears the burden of proof of discriminatory animus, notwithstanding the failure of the defendant's proffer of legitimate nondiscriminatory reasons for the adverse employment action. *See Hicks, 509* U.S. at *511; Betkerur* v. *Aultman Hospital Association,* 78 F.3d 1079, 1095 (6th Cir. 1996); *Mitchell* v. *Toledo Hospital,* 964 F.2d 577, 584 (6th Cir. 1992). In other words, if the defendant fails to present *any* legitimate nondiscriminatory reasons for its actions, the trier of fact may still find that discrimination has been proven on the facts; however such a finding may not be premised simply upon the failure of the defendant to carry its burden of production. *Hicks,* 509 U.S. at 511 (rejection of the defendant's proffered reasons will permit the fact-finder to infer the ultimate fact of intentional discrimination without the requirement of additional proof of discrimination); *E.E.O.C.* v. *Yenkin-Majestic Paint Corp.,* 112 F.3d 831, 835 (6th Cir. 1997) ("[T]he law allows a factfinder to infer intentional discrimination from proof of the prima facie case coupled with a disbelief of the proffered reason for the employer's action, but such an inference is not required."); *Ensley-Gaines* v. *Runyon,* 100 F.3d at 1227 (evidence of pretext presented by plaintiff sufficient to permit a reasonable fact-finder to infer that defendant engaged in discriminatory conduct); *Thurman* v. *Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1166 (6th Cir. 1996) (finding that the fact-finder must review all of the facts together to determine whether evidence of pretext is sufficient to support a finding of discrimination).[4] We find the conclusion of the district court not to be clearly erroneous.

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[4]The statements of the district court in its Memorandum Opinion come dangerously close to presuming that *Hicks* introduced an additional requirement that the plaintiff prove actual

(Continued on next page.)

Having had the benefit of a bench trial in which both sides presented witness testimony and other evidence, the fact-finding and credibility assessments of the trial court are entitled to substantial deference. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson* V. *City of Bessemer* City, 470 U.S. 564, 573-74 (1985).

Barnett contends, as she did below, that Mullins applied the outmoded SQC system while the rest of the DVA employees were subject to the QRS system. The district court pointed out that Barnett knew that her PAP mandated that she make no more than ten procedural, six judgmental or six substantive errors. By her own account, Barnett concedes that the performance measures used in

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(Continued from preceding page.)

discrimination. "While pretext may be persuasive on the issue of discrimination, plaintiff must prove that there actually exists discrimination." J.A. at 280 (Memorandum Opinion); *see also* Maj. Op. 4. As this court's decision in *Kline* makes clear, and as we have attempted to state further, *Hicks* merely requires that the fact-finder decide the case on the facts. No proof other than that required under the *McDonnell Douglas* formula is required of the plaintiff *See Kline,* 128 F.3d at 346 ("The decisions of this circuit [] indicate that a plaintiff is not required to introduce additional evidence of discrimination [beyond evidence of pretext] to prevail."). *Manzer,* 29 F.3d at 1083 (finding that *Hicks* rejected both the "pretext only" and the "pretext plus" positions and "Hicks clarified that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw[.]").

the QRS system, which uses "measurement indicators" error identification, differ substantially from the SQC system. Thus, her awareness that the SQC performance measures applied seems to undercut her allegation that an alternative performance standard had been adopted. Moreover, we take note of Barnett's claim that the number of permissible errors granted to her during the opportunity period left less room for error than the performance standards used throughout the appraisal year. However, we are not in the position of the trier of fact to consider this evidence, and under the clearly erroneous standard of review, the determination of the trial court need only be plausible as to this fact. While the trial court did not expressly state that the opportunity period performance standards failed to evidence discrimination, we find it significant that, even under Barnett's own calculations, her seven substantive errors would have exceeded a strictly proportioned opportunity period performance standard.[5]

Further, as to Mullins' conduct generally, the trial court, based upon evidence presented during the proceedings, found that the personal dislike between Mullins and Barnett did not amount to discrimination on the part of the former. Indeed, the trial court found that the sole witness on Barnett' s behalf who corroborated her accounts that Mullins had referred to her as a "bitch", Eric Shrader, had a personal bias against Mullins, demonstrated by his statement that he had been constructively discharged from the DVA when in fact he had been placed with another agency after losing out to Mullins in a quest for the supervisor

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[5]According to Barnett, the annual performance standards permitted 14.45% upper control limit percentage of error with regard to substantive errors, while the opportunity period performance standards upon which she was appraised left her with a 5.21% upper control limit percentage of error. Had Mulius applied the annual performance standard percentage to the opportunity period, so the argument goes, Barnell would have been permitted 6.52 substantive errors.

position held by Mullins. Moreover, these statements would have pre-dated Mullins' tenure as Barnett's supervisor. The statements of Catherine Zachgo, which detailed that Mullins made it known that he disliked Barnett and used her as the butt of office jokes, are consistent with personal dislike rather than discriminatory animus, as the district court pointed out. Thus, we are inclined to defer to the district court's assessment of the witness testimony proffered by Barnett. *See Anderson,* 470 U.S. at 575. As the district court stated, "personal conflict does not equate with discriminatory animus." While, under other circumstances, proof of personal conflict may provide some indicia of discriminatory animus, such is not the case here. We therefore uphold the district court determination that discriminatory treatment did not cause Barnett's termination.

Turning now to the claim of retaliation presented by Barnett, we note that Barnett must prove by a preponderance of the evidence that: (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of her civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Johnson* v. *U.S. Dep't of Health and Human Services,* 30 F.3d 45-7 (6th Cir. 1994); *Canitia* v. *Yellow Freight Systems, Inc.,* 903 F.2d 1064, 1066 (6th Cir. 1990) (per curiam). Once the plaintiff establishes this predicate, this court applies the *McDonnell Douglas* shifting burden model. Thus, the defendant must articulate a legitimate nondiscriminatory reason for its adverse employment action, whereupon the plaintiff is afforded an opportunity to show that the proffered nondiscriminatory reason is pretextual.

The trial court properly found that Barnett had engaged in EBO activities prior to her discharge. Indeed, her very employment as a counseling psychologist came about as a result of her EEO actions. Nevertheless, the district court concluded that no causal connection existed

between Barnett's participation in EEO activity and her termination. We find that the conclusion of the district court did not rise to the level of clear error.

As suggested above, Barnett worked in the Vocational Rehabilitation and Counseling Department for three years apparently without incident. Her PAP marks demonstrated satisfactory performance during that period. Therefore, the district court decision, finding no causal connection between the termination of Barnett and her pre-1987 EEO actions, does not comprise clear error.

Further, the record supports the district court finding that Barnett's EEO activities subsequent to 1987 were not linked to her termination. Barnett filed a successful EEO complaint against Mullins to correct her performance appraisal for the period of August 2, 1987 to March 31, 1988. Yet, she continued to receive satisfactory performance marks from Mullins. On December 31, 1990, Barnett filed another EEO complaint on the basis of a "memorandum of exceptions," which she claims resulted from her filing of a previous complaint in 1990. The DVA General Counsel consolidated the December 31, 1990 complaint and four subsequent complaints filed by Barnett immediately preceding and following her receipt of the warning letter and later receipt of a notice of removal letter into a single complaint. The fact remains, however, that Barnett failed to meet the performance criteria set forth in her PAP. As required by law, the DVA provided Barnett with an opportunity period to improve her performance. Sadly, Barnett failed to meet the standards imposed on her during that period by exceeding her allowed number of substantive errors by six. Based on her failure to perform according to the objective performance standards, we find that the district court determination does not evidence clear error with respect to the retaliation claim and thus affirm.

III.

After careful consideration of the claims submitted by Barnett on appeal, we conclude that the district court de-

termination that she failed to prove pretext does not comprise clear error. Further, given the history of her EEO activities and satisfactory marks, we conclude that Barnett has not established a prima facie case of retaliation. We AFFIRM.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action Nos. 3:91CV-621-A
3:92CV-671-A

LUCILE BARNETT, Ph.D., - - - - - *Plaintiff,*

v.

EDWARD DERWINSKI, et al., - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—

Entered July 22, 1996

The plaintiff, Dr. Lucile Barnett, brought this action alleging that she was discharged from her employment as a counseling psychologist to the Department of Veterans Affairs on July 9, 1991 in violation of age discrimination, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq., and also was retaliated against for filing EEOC complaints.

Plaintiff, a white female over the age of forty, was terminated from the position she held for four years. She began her work as a counseling psychologist on August 8, 1987, following a decision which this Court rendered holding that the Department of Veterans Affairs had violated Title VII of the Civil Rights Act by reducing her rank from GS-12 to GS-7, which this Court held was done with discriminatory intent. When she was rehired in 1987, the plaintiff signed a performance appraisal plan which contained a section titled "Performance Requirements, Key Responsibilities," and which stated in Section 1(a) that

there was a duty of a counseling psychologist to provide "quality counseling and rehabilitation services to clients following VA regulations, manuals and circulars, and division policy."

For the first three years of her employment she received satisfactory performance appraisals. In March 1991, Leonard P. Mullins, her supervisor, sent the plaintiff a notice that her work had been unsatisfactory, and that she would be terminated unless she met certain criteria. She would be required to demonstrate during an "opportunity period" of 60 days, that her performance had improved enough to warrant her being maintained in her employment as a counseling psychologist. Mullins informed plaintiff that she would only be allowed one substantive error, two judgmental errors, and four procedural errors during the opportunity period. During the opportunity period, Mullins reviewed approximately 35 cases. He found eight substantive errors, thirteen judgmental errors, and eighteen procedural errors. He thereupon sent to plaintiff a notice of termination offering her the opportunity to respond, which she did, orally and in writing. Mullins submitted the termination notice for the approval of the Central Office, which agreed with Mullins' decision to terminate.

It should be pointed out that during the opportunity period, four of the cases cited by Mullins as involving substantive errors were sent on to the Central Office for their review, and the Central Office affirmed Mullins' decision in each of these cases.

Plaintiff contends that Mullins was applying an obsolete system known as SCQ to her performance, while the Department of Veterans Affairs was employing a system known as Quality Review or QRS. Dr. Barnett was aware of the fact that her Performance Appraisal plan contained a provision that she should make no more than ten procedural, six judgmental, or six substantive errors during the rating period. The record reflects that Mullins found seven substantive errors that had occurred approximately 90 days before the end of the rating period. The performance plan

did not contain any specification of the particular performance standards that Mullins required of Dr. Barnett during the opportunity period. Plaintiff contends that it was unfair to permit her only one substantive error during the opportunity period. It is true that such a requirement is more strict than the general limit of six substantive errors during the rating period, but the fact remains that the errors found during the opportunity period are much in excess of the one substantive error permissible.

Plaintiff also contends that the Central Office was biased, and that it had always agreed with Mullins. There was also a contention made that Mullins' review of her performance during the opportunity period was not sent on by Mullins to the Central Office, but that contention is not borne out by the testimony. While it is true the Central office did affirm Mullins in each case, there is no proof of cronyism or personal acquaintance between the reviewing Central Office personnel and Mullins.

Plaintiff did introduce some proof that Mullins disliked her and was hostile towards her. She offered the testimony of Eric Shrader that Mullins had made a remark that plaintiff was a "bitch." If made, the remark occurred prior to the time that plaintiff came under the supervision of Mullins. It is also significant that Shrader was obviously very hostile to Mullins; in fact, he had been contending for the very position that Mullins assumed. His dispute with Mullins and the Veterans Administration was settled, and although he testified that he was constructively discharged, he actually secured a job in another agency.

Another witness, Catherine Marie Zachgo, also testified that Mullins was disdainful of Dr. Barnett and laughed about her performance in the presence of other counseling psychologists. That testimony was denied by Mullins and was not corroborated by the other psychologists. It was proven that Mullins did on one occasion grab a pencil from Dr. Barnett while they were in a discussion, and that she considered this to be an act of physical intimidation.

While there are problems with these witnesses' testimony, it is apparent that Mullins and Dr. Barnett did not like each other, and that Dr. Barnett requested Mullins to convey his messages to her in writing. Nonetheless, personal conflict does not equate with discriminatory animus.

Prior to the decision of the Supreme Court in *St. Mary's Honor Center* v. *Hicks*, 113 S.Ct. 2742 (1993), cases involving Title VII were tried under principles as set out in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Texas, Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983). Those cases held as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext to discrimination.

Burdine, supra, 450 U.S., at 252-253 (cites omitted).

In a 1993 five to four decision, *Hicks, supra*, somewhat altered the burden placed upon the plaintiff in Title VII cases. In *Hicks*, the Supreme Court held that even though a plaintiff presents proof that the articulated nondiscriminatory reasons for the discharge are pretextual, and even though the trier of fact rejects the asserted nondiscriminatory reason for the action, this does not automatically entitle the plaintiff to prevail. While pretext may be persuasive on the issue of discrimination, plaintiff must prove that there actually exists discrimination. The Supreme Court majority opinion states, "Even though rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination, *there must be a*

finding of *discrimination.*" 113 S.Ct. at 2749, n.4 (emphasis added).

In the instant case the Court, is of the Opinion that plaintiff made a prima facie case that she was qualified for the position which she held and that she was replaced by a younger male. Therefore, the burden of going forward shifted to the defendant to articulate legitimate, non-discriminatory reasons for her discharge; this the defendant did. Then, the burden of persuasion shifted to the plaintiff to show pretext on the part of the defendant and, under *Hicks*, actual discrimination. While the Court realizes that the opinions of counseling psychologists may often be matters for reasonable disagreement as between them and their superiors, and it also realizes that in some cases the opinions called for on the part of a counseling psychologist are in fact somewhat subjective, it still remains the case that the reasons for Dr. Barnett's discharge were not fabricated nor pretextual; therefore, she is not entitled to recover either under the trilogy of cases decided prior to *Hicks* (*Burdine, Aikens,* and *McDonnell Douglas*) or under *Hicks* itself.

As to the plaintiff's claim that her discharge was retaliatory, the record reflects that plaintiff filed EEOC complaints concerning various instances of alleged discrimination and retaliation. In July 1991, plaintiff filed an administrative compliant alleging retaliation for her previous protected litigation activity.

In order to prove a prima facie case of retaliation, plaintiff must show (1) that she engaged in statutorily protective activity, (2) of which defendant was aware, (3) after which plaintiff suffered adverse employment action, and (4) there is a causal connection between the protected activity and the adverse action. *Cooper* v. *City of North Olmsted*, 795 F.2d 1265 (6th Cir. 1986); *Canitia* v. *Yellow Freight System, Inc.*, 903 F.2d 1064 (6th Cir. 1990); and *Johnson* v. *U.S. Dept. of Health and Human Services*, 30 F.3d 45 (6th Cir. 1994).

In *Cooper, supra*, Cooper filed discrimination charges with the Ohio Civil Rights Commission on February 15, 1980, claiming harassment by the male drivers working for the defendant bus line. That compliant was settled by an agreement between Cooper, her employer, the Ohio Civil Rights Commission (OCRC), and the Equal Employment Opportunity Commission in March 1980. Following the settlement, Cooper was discharged with eight rules violations. The charges concerned matters which occurred in March, April, May, and June 1980. Cooper was then discharged on June 19, 1980.

The District Court concluded that plaintiff established a prima facie case of retaliatory discharge in light of the fact that she had been cited for many alleged violations of the rules of her employer. However, the Sixth Circuit Court of Appeals held, "the mere fact that Cooper was discharged four months after filing a discrimination claim is insufficient to support an (inference] of retaliation." 795 F.2d at 1272. The District Court noted that "Cooper was cited for rules violations six times in the seven month period preceding her OCRC complaint, and nine times in the four months following that complaint." *Id.* The Appellate Court held that the record showed "no evidence directly linking the nine citations to Cooper's filing of the OCRC discrimination charges. While a disparity in the amount of disciplinary action may certainly be sufficient in appropriate cases to support an inference of retaliation, that is not such a case." *Id.* The Sixth Circuit observed that "the District Court should have focused on whether the City reasonably relied on the deficiency book entries, and not on whether the district court itself believed the citations." *Cooper*, 795 F.2d at 1272, n.5.

Applying the principles of *Cooper* to the case at bar, the Court holds that Dr. Barnett did not establish a prima facie case of retaliation. Some of the complaints filed by her of discrimination occurred in years when she was given a satisfactory performance appraisal, and the last one occurred in 1990, the year before Dr. Barnett was discharged.

The Court realizes that plaintiff's success in her first suit before this Court apparently generated considerable opposition in the Department of Veterans Affairs Office in Louisville, but it is not shown that that resistance continued after Dr. Barnett was reinstated by the orders of this Court. In fact, as Dr. Barnett herself points out, she was given satisfactory performance appraisals in the first three years following her reinstatement.

As was held in *Cooper*, this Court should not put itself in a position of judging the correctness of defendant's action in discharging the plaintiff. Instead, the Court must look at whether the actions and intentions of the defendant were pretextual or amounted to intentional discrimination. As previously noted, the Court has found that the intentions of the defendant were not pretextual, and the Court now finds also that the action in discharging the plaintiff did not amount to intentional discrimination.

A judgment will be entered for the defendant in conformity with this opinion.

Dated_____

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record
Judge's Chambers

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action Nos. 3:91CV-621-A
3:92CV-671-A

LUCILE BARNETT, Ph.D., - - - - - *Plaintiff,*

v.

EDWARD DERWINSKI, et al., - - - *Defendants.*

JUDGMENT—Entered July 22, 1996

This matter having been tried before the Court, briefs having been filed, and the Court having reviewed the briefs and filed its findings of fact, conclusions of law and memorandum opinion, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants.

This is a final and appealable judgment, and there is no just cause for delay.

Dated_____

/s/ Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record
Judge's Chambers

APPENDIX C

[EXCERPTS FROM 28 USC §2101]

TIME FOR APPEAL—S.C.T.

28 § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under Section 1253 of this title, holding unconstitutional in whole or in part, by Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of the district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within thirty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98—209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100—352, § 102 Stat. 663.)

EQUAL EMPLOYMENT OPPORTUNITIES

42 § 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more

employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor or-

ganization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];

(2) although is not certified, is a national or international labor organization or a local labor organization or a local labor board organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exer-

cise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points of the same State but not through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.]

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under

fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e—2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e—16 of this title.

(Pub.L. 88—352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89—554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92—261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95—555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95—598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679; Pub.L. 102—166, Title I, §§ 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

EQUAL EMPLOYMENT OPPORTUNITIES

42 § 2000e—2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because if such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.]

(g) National security

Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provisions of this subchapter, it shall not be an unlawful employment practice for an

employee to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentages imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to

the total number of percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or i the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; and

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process as one employment practice.

(ii) if the respondent demonstrates that a specific employment practice does not cause the disparate impact, the

respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense action against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provisions of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act (21 U.S.C.A. § 801 et seq.) or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employ-

ment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provisions of law, except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties in the action in which the litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

(Pub.L. 88—352, Title VII, § 703, July 2, 1964, 78 Stat. 255; Pub.L. 92—261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub.L. 102—166, Title I, §§ 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074—1076.)

AGE DISCRIMINATION

29 § 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the

government of the District of Columbia having positions in the competitive service, and in those units of legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this sections may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such actio. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub.L. 90—202, § 15, as added Pub.L. 93—259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74, and amended Pub.L. 95—256, § 5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1, eff. Jan. 1, 1979, § 2, 43 F.R. 19807, 92 Stat. 3781.)